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SUPREME COURT, U.S.

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,

Petitioner,

vs.

CRAIG FOWLER,
CHARLES JORDAN,
and
LARRY JOHNSON,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Richard L. Aynes,
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Attorney for Respondents

QUESTION PRESENTED

I. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT THE RECORD IS SUCH THAT THE PRIMARY FACTS UNDERLYING THE LEGAL CONCLUSION REACHED BY A STATE COURT TRIAL JUDGE COULD NOT BE RECONSTRUCTED UNDER LaVALLEE V. DELLE ROSE, S. 410 U.S. 690 (1973) IS CORRECT.

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PARTIES

When the habeas corpus petition below was initially filed, Respondents Fowler, Jordan, and Johnson were confined in the Southern Ohio Correctional Facility (S.O.C.F.), of which Mr. A. R. Jago was Superintendent. In this petition for Writ of Certiorari, Mr. R. C. Marshall, Mr. Jago's successor as Superintendent at S.O.C.F., is named as the Petitioner.

However, none of the Respondents is currently confined in S.O.C.F. Rather, Mr. Fowler is currently being held at the London Correctional Facility, where the Superintendent is A. R. Jago. Messrs. Johnson and Jordan are currently held at the Marion Correctional Facility, where the Superintendent is E. P. Perini. Consequently, the caption in the present case should be denominated: A. R. Jago, Superintendent, and E. P. Perini, Superintendent, Petitioners, vs. Craig Fowler, Charles Jordan, and Larry Johnson, Respondents.

The Respondents, in order to avoid confusion, have utilized the same caption that was used in the initial Certiorari Petition.

PRELIMINARY SUMMARY

Petitioner, recognizing that this Court is not merely a forum for the correction of errors, protests, as he must, that he is not simply a "disaffected litigant" [Petition for Writ of Certiorari at 11-12]. In support of that claim, he criticizes the good faith of the majority below and attempts to present a picture of the United States Court of Appeals for the Sixth Circuit as an errant Court unwilling to follow precedent. In attempting to make that case so as to bring himself within the category of cases deemed appropriate for consideration for potential review by this Court, he cites two other cases from the same Circuit which he maintains confirms his view. Clark v. Jago, 676 F. 2d 1099 (6th Cir. 1982) (cert. pending); Lonberger v. Jago, 635 F. 2d 1189 (6th Cir. 1980), vacated ___ U.S. ___ 68 L. Ed. 2d 290 (1981), opinion after remand, 651 F. 2d 447 (6th Cir. 1981), cert. granted ___ U.S. ___, 71 L. Ed. 2d 292 (1982). An examination of those cases reveal that they both are habeas corpus proceedings which arose from underlying convictions within the State of Ohio and in which the Ohio Attorney General's Office is counsel. As such, they simply demonstrate that he has been thrice "disaffected."

Respondents Fowler, Johnson and Jordan submit that if, as they maintain, the Sixth Circuit has been faithful to the dictates of this Court, then there is no reason for certiorari to be granted. If, on the other hand, the Court below in some manner erred, then this Court can make the proper institutional response when it renders its decision in Lonberger v. Jago, supra. Under either possibility, certiorari is not warranted.

Perhaps the strongest indication of that fact--outside one's independent review of the record--is the action of Judge Engle below who dissented and would have sustained the position of the Petitioner. Though Judge Engle obviously thought the majority was incorrect in its resolution of the issue before it and felt strongly enough to author a dissent for publication, when the

time came to vote for rehearing and rehearing en banc, neither he nor any other Judge on the Sixth Circuit deemed the case of such institutional importance as to justify the time and attention of the Circuit Court for en banc review. If that assessment is correct--and Respondents, while acknowledging that the present case is obviously of paramount importance to them personally, submit that it is--then it should apply a fortiori to the decision of this Court with respect to the appropriateness of certiorari.

STATEMENT OF THE CASE

The major procedural events from the time of conviction to the initiation of proceedings in this Court are set forth in the Petition for Writ of Certiorari at pages 8-10. While Respondents would characterize certain of those proceedings in a somewhat different manner, for purposes of this proceeding, a sufficient basis for understanding the general nature of the proceedings below has been provided. However, there are certain procedural matters which bear emphasis.

First. Petitioner incorporates the fact that eight years have now passed since the initial trial of these Respondents into his argument and "Question Presented." That fact should have no bearing upon the case at bar for two separate reasons. Initially, provision is made under Rule 9(a) of the Rules Governing Section 2254 Petitions to protect the State against unwarranted prejudice due to delay. The Petitioner has neither alleged that he is the subject of any such prejudice nor attempted to invoke the provisions of Rule 9(a).

Further, an examination of the record will reveal that much of the delay in the case at bar is directly attributable to the State. For example, the fact that the State charged each of these defendants with thirty-three (33) separate counts and secured convictions upon only six (6) charges would seem to support at least a prima facie case of over-charging by the State.

This, in turn, resulted in unnecessarily extending the trial proceedings which, in turn, because of the voluminous record, resulted in further delay at every step of the appellate/habeas proceedings.

Similarly, an examination of the record in the habeas corpus proceedings will reveal that these Respondents (then the habeas corpus Petitioners), made every attempt in both the District Court and the United States Court of Appeals to have the state trial court transcript actually physically deposited with the Court. The Petitioner (then Respondent) successfully resisted this action until May 5, 1982, some twenty days after the oral argument, when the Sixth Circuit ordered that the transcript be deposited with the Court. It is a matter of record that it was not until July 7, 1982--some two months later--that the order was complied with.

These examples are merely illustrative. The point is that much of the delay was occasioned by the State of Ohio. Having caused that delay, it cannot equitably be allowed to use that same delay as an excuse to deny Messrs. Fowler, Johnson and Jordan their constitutional rights.

Second. The Petitioner thinks it significant that Respondents did not seek an evidentiary hearing in the District Court below. Though there was perhaps no "stipulation" as that word is generally utilized, Petitioner is correct when he indicates that in a pleading filed with the District Court, counsel for Respondents indicated that an evidentiary hearing was unnecessary (A-74). However, Respondents' position with respect to the need for an evidentiary hearing was not predicated upon any theory of adequate fact-finding by the state trial court. To the contrary, Respondents maintained that they were entitled to judgment even without an evidentiary hearing. This view is supported by consideration of the fact that the issue of voluntariness is not simply a question of fact but rather a mixed question of law and fact upon which the Federal Court has

a duty to make an independent assessment of the record and reach an independent legal conclusion. E.g., Mincey v. Arizona, 437 U.S. 385, 398 (1978).

Respondents submit that the determination of whether an evidentiary hearing is necessary should be analogized to a ratchet: if the record demonstrates--as Respondents think it does here--that the habeas corpus Petitioners are entitled to relief, then it should be granted without a hearing. If, however, the record does not demonstrate that relief is required, then the Petitioners must be given an opportunity for a hearing in which evidence in support of their claims can be offered.

In the case at bar, the Court of Appeals took a third approach. Without expressing any opinion as to the result which would be obtained if a decision were made upon the present record, the Court directed that an evidentiary hearing be held. While this course of action is certainly not as satisfactory to the Respondents as if the Court had granted them judgment, they nevertheless do not deny the power of the Circuit Court to direct that such a hearing be conducted.

Third. In the Sixth Circuit, Messrs. Fowler, Johnson and Jordan raised seven issues for appeal. The Circuit Court, finding the voluntariness issue "dispositive", did not rule upon the other six claims. Slip Opinion at 4 (A-4).

STATEMENT OF THE FACTS

Given the length and complexity of the trial with its rich variety of facts, it is predictable that no statement of the facts designed to be short enough to be encompassed in a certiorari petition would meet with the approval of one who views it with a critical eye.[1/] This is all the more

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1/ This case was reputed to be the longest trial in the history of Cuyahoga County, Ohio. The record consists of over 160 Exhibits and a trial transcript of eight thousand, three hundred and thirty-four (8,334) pages.

true because the very bulk and length of the record makes it impossible for counsel to review the entire record prior to certiorari proceedings and requires that factual representations be based upon recollection, notes, transcript summaries and spot checks of the record.

While acknowledging that Petitioner's recitation of the facts set forth the general outline of the events testified to at trial, Respondents nevertheless submit that a detailed examination of the record would produce a markedly different interpretation of the record and fully reserves the right to make a more detailed presentation of the actual status of the facts contained in the record at any future proceeding.

An example of such disagreement is found in Petitioner's statement that in the "confusion" when the O'Brien family and these Respondents left the O'Brien home, two of the O'Briens were shot (Certiorari Petition at 6). This raises the image that firing was going on and the O'Briens inadvertently stepped into the line of fire when trying to leave the home; or that there was some type of melee in which the victims were accidently shot. However, the record demonstrates a completely different factual situation.

When the individuals left the house they left in two groups, with some coming out the front door and some leaving by the rear door. All <u>three</u> Respondents left by the rear door and were in custody of the police at the time of the shooting. Though some of the family left by the back door with these Respondents, six of the family came out the front door (T. 3392). It is important to emphasize that there was <u>no</u> shooting going on at the time they came through the front door (T. 3278-79). Moreover, the shooting that took place was not indiscriminate. Though six individuals left the house by the front door, only two were shot. <u>Both</u> of those were males who held their hands in the air as if they were surrendering. Dennis O'Brien was shot in the

back four times and John O'Brien was shot in the back five times (T. 3243; 3393). The only conclusion that can be fairly drawn from this testimony is that someone, believing these two O'Brien family members to have been the Respondents, deliberately attempted to assassinate them in what the assassin thought was their attempt to surrender. All testimony produced at the trial intimated only police officers as the persons who did this shooting. Indeed, Dennis O'Brien testified: "Yes, the police shot me, that is a fact" (T. 3249). Thus, the only "confusion" that occurred was that the police assassin(s) confused his/her victims.

As significant as these facts are in and of themselves, they have even greater import to the case at bar where the truthfulness of the Respondents' allegations that the police tried to kill them are at issue and the voluntariness of purported statements is called into question. Initially, the fact that some police officer(s) did attempt to kill individuals thought to be these Respondents, corroborates their own testimony that a prior attempt had been made to kill them and indicates that their fear both for their lives at that time and at the time that they attempted to surrender was not based upon fantasy or speculation, but rather was well-founded.

Second, and equally as important, the shooting of the O'Briens bears a direct relation upon the apprehension and fear of the Respondents when confronted with police officers insisting that they make statements which the police officers would accept as being "true". The O'Briens served as an object lesson (the second one, if the court credits Respondents' account that Detective Copeland had previously attempted to assassinate them) that the police were capable of resorting to violence even to the point of attempting to take someone's life, if they were angered. This object lesson constituted coercion to the maximum extent. It makes little difference whether the police actually pointed a gun at the Respondents' head, or

simply insisted that they give them an "acceptable" version of the incident with full knowledge of the capability of violence in their minds. It is factual matters such as this which demonstrate the unconstitutionality of the police conduct and support the decision of the Court of Appeals below.

In order to attempt to overcome the considered opinion of the majority of the Sixth Circuit Court of Appeals, Petitioner also seeks to invoke a presumption of "regularity" of the proceedings in the state courts below. While this may have some superficial appeal, it is hardly warranted at the case at bar. For example, at the time of these Respondents' trial, the Ohio statutes very clearly indicated that a trial judge could sentence defendants to a maximum/minimum of only 15 years. See R.C. 2929.41. Nevertheless, the trial judge purported to sentence these defendants to 28 to 100 years. Though that sentence was later corrected, the fact that such an "error" (if it was an error) was made should not be ignored. On the one hand, if the trial court was unable to comprehend the meaning of a relatively clear statute, then what expectations can one have that the trial court understood the more sophisticated claims of federal constitutional law with respect to the voluntariness issue here? On the other hand, if the trial court did understand the commands of R.C. 2929.41 and intentionally violated the provisions of that statute--for whatever reason--then what basis is there for presuming regularity?

By the same token, little comfort can be taken by the review that occurred in the state court of appeals. At the time of the state's appeal, the Eighth District Court of Appeals is reputed to have been one of the best appellate benches in the State of Ohio and, indeed, compared favorably with any other intermediate appellate court in the nation. However, much to the regret of these Respondents, none of the regular judges of that court sat on the three-judge panel which heard this case. Rather, three

visiting judges unfamiliar with the history of police and prosecution abuse of minorities within Cuyahoga County--were assigned to hear the case. Even though 13 assignments of error were advanced, the court disposed of those errors in relatively cursory fashion in an opinion that was less than 15 pages (A-62-70). This disposition takes on all the more significance when it is realized that it is a matter of public record that while the regular judges of the Eighth District Court of Appeals each employed two law clerks to assist them in whatever duties they assign in disposing of such cases, the judges from the visiting courts had no law clerks in their employ.

It is because of factual matters such as these that a proper disposition of this case will require detailed consideration of the record.

ARGUMENT

I.

THE DECISION OF THE CIRCUIT COURT BELOW IS CONSISTENT WITH LaVALLEE AND SUMNER

Though Petitioner would have this Court think otherwise, the narrow question before it is whether the Sixth Circuit erred in finding that this was not one of those cases in which the primary facts relied upon by the state trial court in reaching its legal conclusion could be "reconstructed" under LaVallee v. Delle Rose, 410 U.S. 690 (1973).

The relevant portion of 28 U.S.C. Section 2254(d) provides that a presumption of correctness shall normally be accorded to "a determination after a hearing on the merits of the factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia . . . ." The statute then proceeds to outline eight instances in which such a presumption shall not be accorded.

In Townsend v. Sain, 372 U.S. 293, 314-315 (1963), the precursor of Section 2254(d), it was suggested that in certain instances where a state trial court failed to make specific findings of fact, it might nevertheless be possible to reconstruct the court's determinations on matters of primary facts by considering the record before the trial court, the applicable legal standard, and the resolution of the ultimate legal issue by the trial court. Though Section 2254(d) contains no provision for such a procedure, it received approval in LaVallee v. Delle Rose, 410 U.S. 690 (1973). There the Court found, upon the record before it, that "it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him." 410 U.S. at 692.

However, neither Townsend nor LaVallee suggests that such a reconstruction would be possible or appropriate in all

cases.2/

Indeed such an interpretation would render the requirement of 28 U.S.C. Section 2254(d) illusory: in every habeas corpus action there will have been disputed evidence at the voluntariness hearing (otherwise there would be nothing to be litigated in the federal court) and the ultimate questions of law and fact which have been resolved against the petitioner. If the resolution of that ultimate law/fact question is said to be sufficient to assume that the subsidiary historical facts relating to credibility were resolved against the accused, then the requirements of Section 2254(d) are have no meaning. It is submitted that Congress was not engaging in subterfuge in enacting that Section of 2254. Rather, by requiring deference only to written "findings", Congress was expressly rejecting the position that the fact that an accused lost a motion to suppress was as a basis, in and of itself, for concluding that the state court properly resolved the credibility issues against the accused.

This position is reinforced by reference to the case law under this aspect of 28 U.S.C. Section 2254(d). For example, in Anderson v. Pope, 356 F. Supp. 321 (N.D. Cal. 1973), the state court conducted a hearing on the validity of a guilty plea. After the hearing the state court made the statement: "The petition is denied." Pope at 323. Under the State's view the argument would be that since the State Court Judge heard all the evidence concerning the validity of the guilty plea and since he resolved the motion against the defendant, it must necessarily follow that he decided the subsidiary factual issues against the accused. The District Court rejected this logic, indicating

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2/ The language utilized in Townsend spoke of "many situations" and the "ordinary case." 372 U.S. at 314. LaVallee placed emphasis upon the trial court's "extensive" summary of the evidence, 410 U.S. at 691, 693, and the fact that in that case there was "every indication [that the state trial court] applied the correct [legal] standards." 410 U.S. at 695.

that the requirements of subsection "d" had not been met and that the purported "finding" was not entitled to a presumption of correctness under Section 2254.

Similarly, in White v. Estelle, 556 F. 2d 1366 (5th Cir. 1977), the Fifth Circuit Court of Appeals considered the factual basis for denying another challenge to the validity of a guilty plea. In that case the State Court had not only denied a motion to set aside the guilty plea after a hearing, but had supplemented that decision by a subsequent "certificate" relating to the judge's practices in plea bargaining and guilty plea situations. Both the District Court and the Circuit Court refused to apply the presumption of correctness to the State Court's decision because:

> ". . . the requisites of Section 2254(d) were not met because there were not sufficient written findings prepared by the state court." White at 1368.

Finally, in Elliott v. Morford, 557 F. 2d 1228 (6th Cir. 1977), cert. den. 434 U.S. 1040, the court considered the effect of a decision of a state court judge denying a motion to suppress when there was conflicting testimony as to the voluntariness of a confession. Because the state Court had denied the motion, it might have been argued--as the State argues here--that the State Judge had necessarily resolved the disputed factual issues against the defendant. But the court eschewed such an approach, holding instead that:

> ". . . reliance on the presumption provided in 28 U.S.C. Section 2254(d) is misplaced . . . the trial judge made no findings of fact on the issue of voluntariness of the confession presented by the motion to suppress . . . ." Elliott at 1232.

The application of these principles to the case at bar indicates that none of the purported determinations made by the state trial court fall within the purview of Section 2254.

Thus understood, it can scarcely be disputed that even when construed most favorably to Petitioner, the interplay between Townsend, LaVallee, and Section 2254(d), results in three classes of cases: (1) those in which the state trial court has made specific findings of fact; (2) those in which such findings of fact--while absent--may be "reconstructed"; and (3) those in which the nature of the case is such as not to allow for the reconstruction of the primary facts upon which the state trial court's legal conclusions were based.

From this perspective, the judgment upon which Petitioner seeks review in this Court is an extremely narrow one. It does not, as he suggests, challenge th deference required to be paid by a state court finding under Section 2254(d), Sumner v. Mata [I], 449 U.S. 539 (1981), or Sumner v. Mata [II], ___ U.S. ___, 71 L. Ed. 2d 480 (1982). It does not challenge the procedures outlined in Sumner v. Mata [I] in order to find that one of the eight Section 2254 exceptions apply. Nor does it challenge the LaVallee view that in certain instances a Federal Court may--in the absence of express findings of fact by a state court--reconstruct the primary factual findings upon which the State court's legal conclusions were based.

Rather, the very narrow question here is whether, even under LaVallee, this is one of those cases in which such a reconstruction is proper or whether it is one in which the failure of the state court to make specific findings of fact requires an assessment of the evidence by the District Court. The majority of the Circuit Court below found that, upon the particular facts before it, this case was not appropriate for the type of "reconstruction" utilized in LaVallee.

While Respondents most assuredly submit that the decision of the majority below was correct, it must nevertheless be observed that such a decision--whether right or wrong--cannot be considered of such a nature as to justify review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

RICHARD L. AYNES
Counsel of Record

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Attorney for Respondents

CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Brief in Opposition were sent by first-class mail to Counsel for Petitioner(s), Simon B. Karas, 30 East Broad Street, Suite 1513, Columbus, Ohio, on this 29th day of December, 1982. The address of R.C. Marshall is P. O. Box 45699, Lucasville, Ohio 45699-0001; the address for A. R. Jago is P. O. Box 69, London, Ohio 43140-0069; the address of E. P. Perini is P. O. Box 57, Marion, Ohio 43302.

RICHARD L. AYNES
Counsel for Respondents

ORIGINAL

Case No. 82-876

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October Term, 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,

Petitioner,

vs.

CRAIG POWLER,
CHARLES JORDAN,
and
LARRY JOHNSON,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

MOTION TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, CRAIG POWLER, CHARLES JORDAN, and LARRY JOHNSON, the Respondents, hereby request that they be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavits. All three Respondents were granted leave to proceed in forma pauperis in the United States District Court for the Northern District of Ohio and in the United States Court of Appeals for the Sixth Circuit in the course of the proceedings below.

Respectfully submitted,

RICHARD L. AYNES
Counsel of Record

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Motion and attached Affidavits to Counsel for Petitioner, Simon B. Karas, 30 East Broad Street, Suite 1513, Columbus, Ohio, on this 20th day of January, 1983. The address of R. C. Marshall is P. O. Box 45699, Lucasville, Ohio 45699-0001; the address for A. R. Jago is P. O. Box 69, London, Ohio 43140-0069; the address of E. P. Perini is P. O. Box 57, Marion, Ohio 44302.

Richard L. Aynes

RICHARD L. AYNES
Counsel for Respondents

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent, Southern Ohio Correctional Facility, Petitioner, -vs- CRAIG FOWLER, CHARLES JORDAN, and LARRY JOHNSON, Respondents.	AFFIDAVIT OF INDIGENCE

I, LARRY JOHNSON, being first duly sworn, depose and say that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? No.

   A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. May 1974 - $206. wk. $820 M.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? NO

   A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? NO

   A. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? NO

   A. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. Latina E. Germany-(Daughter)

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Larry Johnson
LARRY JOHNSON

Duly witnessed and sworn before me, a Notary Public, this 7 day of January, 1983.

John D. Morgan
NOTARY PUBLIC

JOHN D. MORGAN, Notary Public
State of Ohio
My Commission Expires October 2, 1987

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent, Southern Ohio Correctional Facility,	AFFIDAVIT OF INDIGENCE
Petitioner,	
-vs-	
CRAIG FOWLER, CHARLES JORDAN, and LARRY JOHNSON,	
Respondents.	

I, CHARLES JORDAN, being first duly sworn, depose and say that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? No.

   A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

   B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Hamilton Bed Spa $ 850.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No

A. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? No

A. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Charles Jordan
CHARLES JORDAN

Duly witnessed and sworn before me, a Notary Public, this 6 day of January, 1983.

John D. Morgan
NOTARY PUBLIC
JOHN D. MORGAN, Notary Public
State of Ohio
My Commission Expires October 2, 1983

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,

Petitioner,

-vs- : AFFIDAVIT OF COUNSEL

CRAIG FOWLER,
CHARLES JORDAN, and
LARRY JOHNSON,

Respondents.

RICHARD L. AYNES, being first duly sworn, deposes and says that:

1. I am a member of the Bar of this Court and Counsel for Respondents Fowler, Jordan and Johnson.
2. I sent affidavits of indigence to all three respondents on the same date. While those for Mr. Jordan and Mr. Johnson were completed and returned, the affidavit of Mr. Fowler has not yet been received.
3. On Tuesday, January 18, 1983, a member of my staff contacted the Social Services Department of the London Correctional Facility where Mr. Fowler is being held and was assured that a member of their staff would speak with him and seek to expedite the return of the affidavit.
4. As soon as this affidavit is received it will be forwarded to the Clerk's Office.
5. It is my belief that Mr. Fowler is indigent. That belief is based upon the following factors:
   A. The records of the state trial court indicate that he was found indigent at the time of his trial and was represented by court-appointed counsel throughout the state proceedings;

B. The Federal District Court granted a Motion for Leave to Proceed *in forma pauperis* in the Habeas proceeding below and he was also allowed to proceed *in forma pauperis* in the Sixth Circuit;

C. He has been continuously incarcerated since the time of his arrest in 1974.

FURTHER AFFIANT SAYETH NAUGHT.

Respectfully submitted,

RICHARD L. AYNES
Counsel for Respondent
Fowler

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Akron, Ohio 44325
(216) 375-7751

SWORN TO BEFORE ME and subscribed in my presence this 20th day of January, 1983.

NOTARY PUBLIC

SHIRLEY E. JORDAN, Notary Public
Summit County, Ohio
My Commission Expires June 25, 1983

RECEIVED
JAN 28 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent, Southern Ohio Correctional Facility, Petitioner, -vs- CRAIG POWLER, CHARLES JORDAN, and LARRY JOHNSON, Respondents.	AFFIDAVIT OF INDIGENCE

I, CRAIG POWLER, being first duly sworn, depose and say that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? No.

   A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

   B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. MAY, 1974

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2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No

A. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? No

A. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

CRAIG POWELL

Duly witnessed and sworn before me, a Notary Public, this 7th day of January, 1983.

NOTARY PUBLIC

PHILIP E. VANCE
NOTARY PUBLIC-STATE OF OHIO
MY COMMISSION EXPIRES DEC. 6, 1984

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Affidavit to Counsel for Petitioner, Simon B. Karas, 30 East Broad Street, Suite 1513, Columbus, Ohio on this 24th day of January, 1983. The address of R. C. Marshall is P. O. Box 45699, Lucasville, Ohio 45699-0001; the address for A. R. Jago is P.O. Box 69, London, Ohio 43140-0069; and the address of E. P. Perini is P.O. Box 57, Marion, Ohio 43302.

RICHARD L. AYNES
Counsel for Respondent
Fowler